



File Review

A Conversation Between: You Michael G Soukup (Attorney)

Case Link: Robert Peterson



Michael G Soukup (Attorney)Robert,

May 27, 2015 - 11:13pm

Let me start by saying that, unfortunately, I have not found a solid problem with your case that will get the relief that you want. Issues I need to finish looking into are whether you are still able to challenge anything in court because your sentence is finished. I still think that might not be possible, but I still need to check a couple things that might change that. For one thing, I want to check whether the fact that you have many conditions as a remaining part of your conviction would allow you to still challenge the conviction. Alternatively, I want to check whether it might be possible to challenge the conviction under 806.07 which allows for challenging void judgments.

Before I finished checking *how* to challenge anything, I have been checking whether there is anything to challenge. I was looking for claims that could render your conviction or plea void. A void order, as may know and understand already, refers to an order that lacks authority. Arguably, if it lacked authority when it was issued, the passage of time should not make it permissible. In other words if an order is void, it remains void, and can be fixed at any time. The value in a void claim is that it might be the only type of issue that could survive the problems of raising a claim after your sentence is completed. But again, the problem in your case is that there still needs to be some procedure for you to get into court to even make the argument (maybe 806.07).

One thing that stood out to me was the issue that your appellate counsel raised regarding whether the court even had the authority to accept the deferred prosecution agreement. I looked into some of the arguments counsel made to see if there was a mistake or it could have been argued better, but I did not find anything when I checked the cases he cited. Regardless, it would be very hard to argue at this point an ineffective assistance of counsel claim that counsel should have argued the same issue differently. However, I want to check the statutes involved once more to make sure a claim related to that issue could be argued as void.

The other problem that I came across was the terms of the plea agreement. Specifically, the offer of what you would receive if you had successfully completed probation. There would be problems with the argument that would need to be overcome, but essentially the argument would be that if you were promised something that was impossible, perhaps it could be argued that the whole agreement to plea should be voided. Of course, you did not receive the more beneficial charge, but it is obviously an essential part of the whole agreement.

According to the agreement, if you were successful with probation, the charge would be amended to a "misdemeanor offense of sexual contact with a person under the age of 18." I cannot find an offense that meets this exact description. I looked at the statutes that were misdemeanor sex offenses involving persons under 18. One is 948.09, which is sexual intercourse with a child age 16 or older. Notably, the ADA said at the hearing accepting the agreement that it would be a misdemeanor offense of sexual contact with a person who is 16 but not yet 18. But, the problem with this is that she was not 16 yet at the time of the offense. She was 15 under either of the alleged incidents. If she was only 15, I think the judge would be barred from entering a misdemeanor offense when the legislature did not allow it.

There is another statute, which is 940.225(3m), which is sexual contact with a person without the consent of that person is guilty of a Class A misdemeanor. The problem with this is that while it seems to solve the age discrepancy, the issue of consent was not part of the plea hearing.

I ordered and obtained the plea questionnaires in your case to see what elements you were advised of at the time the judge accepted your plea. For some reason there were two questionnaires. Do you know why? One is dated on the day of the plea hearing, and one is dated at the previous date. Is it because the family did not like the agreement at first? Regardless, it appears the later date is one that matters because it was dated at the time of the plea hearing. In that later questionnaire the elements were that there was (1) sexual intercourse and (2) she was not 16 at the time. But again, the problem with those elements is that it does not fit exactly into any offense (948.09 or 940.225(3m)).

Assuming there is problem with what the promised offense was supposed to be, it remains to be seen whether it could be turned into an argument that would get the relief you want. I believe (absent doing additional research) that an argument could be made that there was no "meeting of the minds" between you and the state because the promised reduced charge was impossible, and thus the court's order allowing the agreement should be void because of it.

Your appellate counsel did sort of raise this issue on appeal, but did not ask the court to find it void. The appellate court's decision in the case was very poorly reasoned on all the issues, including the problem of what the promised offense was going to be. The appellate court's idea that you invited the error by going along with agreement is not the point behind void orders. If the legislature does not allow a certain order to be entered, people cannot work around it, whether they are judges, prosecutors, or defendants.

There were a few other possible problems with your case I noticed, but nothing that could be likely be argued as harmful, especially at this late date.

For the violation of probation, I reviewed the documents and listened to the hearing. I cannot think of a problem with the decision to finding there was a violation, or with the decision to ultimately revoke your probation. We can discuss that in more detail if you would like, but there is not an issue I can see that would arguably render your conviction void (as would likely be necessary at this time).

These are my thoughts right now. As I indicated earlier, I am pretty much done. I want to check a couple things before concluding my review. Specially, I want to confirm whether it is possible or not for to raise an issue with your sentence complete, even if it is an argument that there something void about your conviction. I also want to confirm whether the court was authorized to enter the agreement at all. While it was unsuccessful in your appeal, if it is void, it should not matter what the court said earlier, it's still void.

I am towards the tail end of the busy period I described in my last message. But I will try to get these last few matters addressed in the next few days and get back with you again with some more finality next week.

Of course, contact me at any time if you have questions or concerns in the meantime.

- Mike



Prosecuting 16 yr old

A Conversation Between: You Michael G Soukup (Attorney)

Case Link: None



Michael G Soukup (Attorney)Robert,

Jun 10, 2015 - 9:40am

Sorry I missed you yesterday. We can talk more too, but here are a couple thoughts about the matter you asked about. As I understand it, you indicated that an officer observed the sexual act, which I believe meets the definition of sexual intercourse for purposes of the statutes. She was 14 and he was 16. If no force was proven, it could be 2nd degree sexual assault, which is intercourse with a person who is not 16, its a class C felony. If force was used, then its 1st degree sexual assault, a class B felony.

The one part of this that I do not know is how his age plays into this. At age 16, he is still considered a minor. There are many rules about when a minor can be tried as an adult, and I do not know off the top of my head how a sex offense would impact that. As I read the statutes, its not a defense that he is a minor though.

Now, if an officer observed this situation, I would imagine a prosecutor would not be concerned about proving it. Maybe there are other reasons why they would not pursue it. I would guess, but I could be wrong, that prosecuting a sex offense could be a priority.

I have never advised anyone about starting a prosecution. I suppose besides contacting the prosecutor's office, there is following up with the police department. I assume there were police reports. The only people I've seen file a complaint (which officially is usually the first official paper filed with the court) is a police officer. So maybe it takes getting the police or prosecutor on board to do something. Besides putting public pressure on the police or the prosecutors office, it is usually entirely up to them who to go after.

I will try calling you again today, but maybe not until Friday about this and case I reviewed for you. I have a hearing tomorrow and a few other things that I have to get done by then.

Talk to you soon.

Mike

**Issues**

A Conversation Between: You Michael G Soukup (Attorney)

Case Link: Robert Peterson



Nov 10, 2015 - 11:37am

Michael G Soukup (Attorney)Robert,

We can talk about these matters over the phone too, but let me try to respond to some of your concerns this way initially.

First, you asked why it was fair that sexual intercourse between a 15 and a 17 year old is a felony, but the same conduct between a 16 and 18 year old is a misdemeanor. There is no satisfactory answer, except that the legislature decided that there is a difference. The legislature decided that those who have sexual intercourse with someone who has not reached 16 years old is different those having a felony. For your case, there is nothing can be done to change the legislature's view about it.

Second, you brought up the fact that I do not have all the documents relating to the theft case. Perhaps I do not have them all, but I do have some. I have one that documents what occurred when the police searched your car and called Jerilyn's mother. The difficulty in challenging your case at this late makes it hard to challenge something about your case that would be contained in the other documents relating to the theft case.

Third is consent, and perhaps it is this issue that has you concerned about some facts in the theft case docs? The problem with consent is that it is not a defense. It does not matter if a 15 year old consents or if the mother consented to you being with her daughter. Even if it were a defense, there is nothing that can be done to salvage that defense at this time. Of course, if your conviction were vacated for the reasons I have mentioned before, which is very low, you should be aware of the fact that consent is not an available defense. I have also mentioned that your statements admitting to sexual intercourse also makes it very difficult to keep a vacated conviction from being pursued again.

Fourth is the conditions and fifth is obtaining documents associated with your time on probation and in prison. I will get back to you in more detail about each one. Let me say though that while I understand that the conditions you face feel like punishment, and I would share your view, courts do not view the conditions as punishment; instead they are conditions for public safety. Therefore, they cannot be challenged as an ex post facto violation.

I hope this addresses some of your questions, and again, I'll get back to you on four and five soon.

**non-health DOC records**

A Conversation Between: You Michael G Soukup (Attorney)

Case Link: Robert Peterson



Michael G Soukup (Attorney)Robert,

Jul 11, 2016 - 10:23pm

Last week I received all the non-health DOC records. I'll send the paper copies to you. In case it is helpful to have digital copies, I uploaded the scanned files to mycase as well. Once I get a chance to review all of it, we can talk again regarding how to get back into court on your conviction.

I am also wondering whether you have considered seeking an exception to the registration requirements and/or the local ordinance restrictions that I described in the letter dated 5/11/16. We can discuss it further when we discuss the DOC records if you want.

- Mike



records review

A Private Conversation Between: You Michael G Soukup (Attorney)

Case Link: Robert Peterson



Michael G Soukup (Attorney)Robert,

Aug 16, 2016 - 4:12pm

Have you had a chance to review the theft circuit court record and DOC records yet? I have looked through them and I don't see them having a big impact on my prior opinions about challenging your conviction at this time. In other words, I don't see anything in them that could help form an argument that your conviction is void. Of course, I want to hear what you have to say about the records as well.

I looked back at my notes from our prior conversations. Assuming my notes are correct, I noted that one reason you wanted the theft records was to help show that her parents knew about and consented to the two of you being together, and that there was a lie detector done while in the DOC.

As for the first item, I don't see anything in the circuit court records that reflect that, however, in the records we already had, there was a police report that indicated exactly that point. I have uploaded that police report and the relevant section is highlighted.

The police report clearly shows that her mother had no problem with you and her being together that far away. We have discussed the relevance of this many times before, and if you want to go over it again we can. But in short, the fact she gave consent for you to be there is not the equivalent of consent to the elements of the offense. She was underage and neither her nor her mother could consent.

As for the lie detector, I did not catch a mention of it in the DOC records when I reviewed them. Maybe I missed it.

I would not doubt that there are other items you wanted me to look at that are not reflected in my notes of our prior conversations. Please let me know what else to focus my attention on, or share any other thoughts based on the records we now have that you believe could render your case void. Remember, we have to show that the court lacked the power to enter the conviction. Errors by counsel, or other problems that would not necessarily prevent the judge from entering the conviction, are likely not enough.

Let me know when you can what you think. And again, I am interested to know what you think about the information I sent to you seeking to end registration requirements and exempt yourself from local ordinance restrictions.

May 11, 2016

Robert Peterson
235 West 2nd Ave.
Elkhorn, WI 53121

Mr. Peterson:

This letter is going out a day late because I had a hard time reaching DOC to get your ID number. To reiterate our conversation yesterday, we'll get records from the DOC and the Taylor County circuit court on the theft case. However, just to be clear, I am confident with the research I've done in your case that these additional documents will not yield issues that would rise to the level of voiding your conviction. Again, the only possible option is to argue your conviction is void, but not other constitutional errors, because you are no longer in custody. Once the records arrive, we can address this again.

Records Request

There are two DOC records forms enclosed; one for health information and the other for everything else. Out of caution, I figured it was better to send both.

For the non-PHI form, I checked the main ones (Institution Social Services File, Legal, Division of Community Corrections). In the other sections (Education, Employment, Other), if you believe those sections should be filed out, do so. Most important, please initial by the authorization and then sign/date at end; I put a sticky note at both places.

For the PHI form, I attached a couple sticky notes explaining your choices, and a reminder to sign and date on the back.

Once you are finished with both forms, send them back to me in the envelope provide, and then I'll copy it and relay them to the DOC.

Exception to Registration Requirements

I don't believe we discussed this yesterday, but since our last contact, I came across a possible way to ask the circuit court to order an end to your registration requirements. I know your ultimate goal is to get the conviction taken away. It's also my understanding that being taken off the registry will not prohibit the local restrictions.

However, if you were not aware of this option, I thought you may want to know about it nonetheless.

Under Wis. Stat. § 301.45(1m), a person is not required to register if (relevant to your case):

- (a)(1) it was a conviction for Wis. Stat. § 948.02(2) after 1993;
- (a)(1g) the violation “did not involve sexual intercourse...either by the use or threat of force or violence or with a victim under the age of 12 years”;
- (2) you were under 19 at the time and the victim was not more than four years younger; and
- (3) “It is not necessary, in the interest of public protection, to require the person to comply with the reporting requirements...”

In court, you would have the burden to establish by clear and convincing evidence that the above criteria are satisfied. Then the court decides whether to end your registration requirements, considering the following factors: the ages of you and her at the time of the offense; the relationship between you and her at the time; whether the violation resulted in bodily harm; whether the victim had a mental illness or deficiency; the probability you would commit other violations in the future; any expert opinions; and any other relevant factors.

We can discuss this more if you are interested, but given my understanding of your case, I think you have good arguments to successfully obtain an order ending your registration requirements.

Local Ordinance Restrictions

I mentioned yesterday that I had looked at the local ordinances where you live. It appears that they have a way to ask for an exemption from the restrictions. Enclosed is the local ordinance section describing the appeal process and a copy of the form you would complete. If you have questions about this, I can answer them as well.

Sincerely,



Michael G. Soukup
Wis. State Bar No. 1089707
Ill. State Bar No. 6293845



Subject: RE: Robert peterson
From: Michael Soukup (michael@pinixsoukup.com)
To: customfinish22@yahoo.com;
Date: Wednesday, June 21, 2017 12:49 PM

Robert,

Thank for checking in with me. Sorry I have not gotten back to you sooner. I was waiting to hear back on a somewhat related matter, which I'll explain.

After reviewing the proposed law, as it is written in the pdf I emailed to you, I believe it fits your situation. In other words, had it been around at the time you were charged, this would have been available as a possible conviction instead of the felony. How exactly everything would have played out back then had the law been around is not certain of course. I know that the victim/victim's family was probably putting pressure on the State to say it was not consensual. You have always been clear and up front that sexual activity happened, but it was consensual. Given how the State was willing to negotiate charges that did not involve force, it's likely that you would have ended up with a misdemeanor not a felony had the law been around then. So, assuming the law passes as is, I think you could argue that instead of having a felony, it should be considered a misdemeanor. The problem is how to do so.

Your case is final. Once a case is final it is not easy to reopen it. If however, the State were in agreement, the likelihood of reopening the case and entering it as a misdemeanor might be more likely. Another case I am aware of (the one I was waiting on) involves a person trying to get their case reduced from a felony to a misdemeanor so that they can possess a gun again. But it looks like the only way that old case can get changed is under expungement rules. If and when the new law passes, and its possible to expunge under the new law, maybe that would make it easier to get back into court. Otherwise, unless the DA agreed and the court went along with it, the new law might not be able to provide you with a direct benefit.

Of course, the new law might give some support to what is already available to you, which is seeking to get your name off the SO registry as well the local SO rules. If you will recall, I provided that information to you before.

Finally, I don't mind answering a question here or there, but as far as the case with our firm goes, unless you want me to take action in court on your case, I believe we should consider it closed. I have a balance of \$346.19 remaining in our trust account that had been set aside for costs that was not all used up. Please let me know where to forward those funds.

If you have any other questions, about the law or closing the case, let me know. In the meantime, I will keep an eye/ear out for the law's passage, so that if you want to see if what possibilities there could be with going to the DA and getting before a judge about it, I can revisit that possibility at that time.

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-----Original Message-----

From: Robert Peterson [mailto:customfinish22@yahoo.com]
Sent: Tuesday, June 20, 2017 5:39 PM
To: Michael Soukup <michael@pinixlawoffice.com>
Subject: Robert peterson

Please read and get back to me. I figured that I would have heard back from you by now.